IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EVA SADECKI,	)	**No. 27453-5-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,	)	**UNPUBLISHED OPINION**
Respondent.	)	
	)	

Brown, J. ⎯⎯ While receiving loss of earning power (LEP) benefits for a work-related injury, Eva C. Sadecki sustained a second work-related injury for which she applied for and received time loss compensation from the Department of Labor and Industries (the Department). Ms. Sadecki settled her first injury claim with a lump sum payment before fully litigating her second injury claim. Although Ms. Sadecki was earning $4,810 monthly at the time of her first injury, the Department issued an order setting Ms. Sadecki's wage rate for purposes of time loss compensation at the $2,512.80 monthly rate she was earning from her employer at the time of her second injury. Ms. Sadecki appealed this order to the Board of Industrial Insurance Appeals

(the Board), arguing the wage rate calculation should have included the LEP benefits she was receiving from her first injury, or, in the alternative, the wage rate calculation should have been based on her earnings prior to her first injury. The Board affirmed the Department's order. Ms. Sadecki unsuccessfully appealed to the superior court, before this appeal. We affirm as a matter of law under RCW 51.08.178 and *Cockle v. Dep't of Labor & Indus*., 142 Wn.2d 801, 16 P.3d 583 (2001), because the Board correctly defined the wage Ms. Sadecki earned as that received at the time of her second injury.

FACTS

Generally, the facts are unchallenged, and therefore, are verities on appeal. *See Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 927, 117 P.3d 385 (2005) (stating "unchallenged facts of an agency's final decision are verities on appeal").

In 2002, Ms. Sadecki worked for Providence Yakima Medical Center (Providence Yakima) as a registered nurse. On October 17, 2002, while acting in the course of her employment with Providence Yakima, Ms. Sadecki sustained an injury to her neck. Her average monthly wage at the time of this injury was $4,810. Ms. Sadecki received LEP benefits for this injury. These benefits were discontinued effective December 31, 2003, based on an agreement entered into by Ms. Sadecki and Providence Yakima before the Board on May 4, 2006. In this agreement, Ms. Sadecki and Providence Yakima stipulated to the following facts, among others:

- [Ms. Sadecki's] conditions proximately caused by the October 17,

> 2002 industrial injury were not fixed and stable as of December 30, 2003 when she sustained a second industrial injury.
> - As of December 30, 2003 [Ms. Sadecki] continued to suffer from physical limitations and restrictions proximately caused by the October 17, 2002 industrial injury when she sustained a second injury.
>
> . . . .
>
> - As of December 31, 2003 [Ms. Sadecki] was capable of reasonably continuous gainful employment with respect to conditions proximately caused by the October 17, 2002 industrial injury and was no longer entitled to [LEP] benefits under the claim arising out of that injury.

Board Record Transcript (BRT) Ex. 3, at 1-2. Based on these stipulated facts, the Board directed the Department to:

> [D]eny responsibility for [Ms. Sadecki's] conditions proximately caused by a new accident, injury, or exposure occurring on or after December 30, 2003, to pay [Ms. Sadecki] [LEP] benefits for the period beginning November 19, 2003 through December 30, 2003 inclusive, to award [Ms. Sadecki] a permanent partial disability consistent with category 3 WAC 296-20-240 for permanent cervical and cervico-dorsal impairment(s), and to close the claim.

BRT Ex. 3, at 2.

Ms. Sadecki returned to work after her injury, as a staffing coordinator at Yakima Regional Medical Center (Yakima Regional)[1] before sustaining a second work-related injury (low back) on December 30, 2003. Ms. Sadecki was then married with no dependent children; was paid $17.45 an hour; and worked eight hours per day, four days per week. Her employer was not providing health care benefits. Her average

[1] On August 16, 2003, Providence Yakima was sold, and the facility began operations as Yakima Regional. Providence Yakima was a self-insured employer, while Yakima Regional is a state fund employer.

monthly wage was $2,512.80.

After the second injury, Ms. Sadecki filed an application for benefits with the Department. The claim was allowed and time loss compensation was paid. On February 17, 2004, the Department issued an order setting Ms. Sadecki's wage rate at $2,512.80 per month, based on a wage at the time of injury of $17.45 per hour, eight hours per day, four days per week, and her status of married with no dependent children. On December 14, 2005, the Department issued an order affirming its February 17, 2004 order, following a protest by Ms. Sadecki. Ms. Sadecki appealed this order to the Board. She argued the wage rate calculation should have included the LEP benefits she was receiving from her first injury, or, in the alternative, the wage rate calculation should have been based on her earnings prior to her first injury.

On December 22, 2006, a hearing on Ms. Sadecki's appeal was held before an Industrial Appeals Judge (IAJ). On April 3, 2007, the IAJ issued a proposed decision and order reversing the December 14, 2005 order of the Department. Later, the Board granted review of this proposed decision and order and reversed the IAJ. On June 11, 2007, the Board issued a decision and order affirming the December 14, 2005 order of the Department. The Board's following conclusions of law are relevant:

> [ ] Per RCW 51.08.178, Ms. Sadecki's wage rate . . . is properly based on her average monthly wage as of December 30, 2003, the date of the industrial injury.
> [ ] The [LEP] benefits Ms. Sadecki was receiving on December 30, 2003, [for the first injury], do not constitute wages or consideration of a like nature to wages, within the meaning of RCW 51.08.178.

Board Record (BR) at 5. Ms. Sadecki unsuccessfully appealed the Board's decision and order to the superior court. Ms. Sadecki appealed.

ANALYSIS

A. Time Loss Calculation

The issue is whether the Board correctly calculated Ms. Sadecki's wage rate for purposes of time loss compensation for her December 30, 2003 industrial injury.

When reviewing an administrative board ruling, this court stands in the same position as the superior court. *Energy Northwest v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009) (citing *Dep't of Labor & Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581-82, 178 P.3d 1070 (2008)). "'An appellate court accepting an appeal from an agency decision applies the proper standard of review directly to the record of the administrative proceedings and not to the findings and conclusions of the superior court.'" *D.W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 125-26, 177 P.3d 143 (2008) (quoting *Brandley v. Employment Sec. Dep't*, 23 Wn. App. 339, 342, 595 P.2d 565 (1979)). "An agency's legal determinations are reviewed under an error of law standard, 'which permits us to substitute our judgment for that of the agency.'" *Energy Northwest*, 148 Wn. App. at 463 (quoting *Robison Constr., Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 369, 373, 149 P.3d 424 (2006)).

Statutory construction is a question of law reviewed de novo. *Cockle,* 142 Wn.2d at 807 (citing *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996)). "When statutory language is susceptible to more than one reasonable interpretation, it is considered ambiguous." *Id*. at 808 (citing *Harmon v. Dep't of Soc. & Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998)). If a statute is ambiguous, in order to discern legislative intent, we "resort to principles of statutory construction, legislative history, and relevant case law." *Id*. (citing *Harmon*, 134 Wn.2d at 530).

"When an injured worker is classified as temporarily disabled, wage replacement benefits may be available under RCW 51.32.090." *Hubbard v. Dep't of Labor & Indus*., 140 Wn.2d 35, 38 n.1, 992 P.2d 1002 (2000). "Such benefits are referred to as 'time loss' benefits when the temporary disability is total and [LEP] benefits when the worker is able to return to work but the worker's former earning power is only 'partially restored.'" *Id*.

The rate of time loss compensation is "determined by reference to a worker's 'wages,' as that term is defined in RCW 51.08.178, at the time of the injury." *Cockle*, 142 Wn.2d at 806; *see also* RCW 51.32.090(1) (authorizing time loss compensation). RCW 51.08.178(1) provides, in relevant part:

> For purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned.
>
> . . . .
>
> The term "wages" shall include the reasonable value of board, housing, fuel, or *other consideration of like nature* received from the

> employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section.

(Emphasis added.)

Ms. Sadecki first contends, under RCW 51.08.178(1), that the LEP benefits she received for her first industrial injury, on October 17, 2002, should have been included in the wage rate calculation. Ms. Sadecki appears to argue that the LEP benefits from her first industrial injury should have been included in the wage rate calculation for her second industrial injury as "other consideration of like nature." RCW 51.08.178(1).

In *Cockle*, our Supreme Court found the phrase "other consideration of like nature" in RCW 51.08.178(1) ambiguous. *Cockle*, 142 Wn.2d at 808. The court acknowledged that "'Title [51] shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.'" *Id*. at 811 (quoting RCW 51.12.010). In addition, the court acknowledged that "Title 51's overarching objective is 'reducing to a minimum the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment.'" *Id*. at 822 (quoting RCW 51.12.010). The court then construed the statutory phrase "board, housing, fuel, or other consideration of like nature" to mean "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival." *Id*. The court further found:

> Core, *non* fringe benefits such as food, shelter, fuel, and health care all share that "like nature." By contrast, we do not believe injury-caused

> deprivation of the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival qualifies as the kind of "suffering" that Title 51 was legislatively designated to remedy.

Id. at 822-23. The court concluded that health care premiums paid by the injured worker's employer were non-fringe benefits, and therefore, should have been used to calculate her workers' compensation payments. *Id*. at 823.

Subsequent to *Cockle*, our Supreme Court stated, "the majority in *Cockle* recognized that the legislature limited the definition of wages to paycheck wages and the value of 'other consideration' such as board, housing, and fuel." *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 489, 120 P.3d 564 (2005). Further, the court stated, "the legislature intended to include in wages only those items of in-kind consideration that a worker must replace while disabled and that are critical to the worker's health or survival." *Id*. at 488-89.

Ms. Sadecki's LEP benefits from her first injury do not constitute "other consideration of like nature" under RCW 51.08.178(1). First, her LEP benefits were not "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of the injury." *Cockle*, 142 Wn.2d at 822. Ms. Sadecki did not lose her LEP benefits as a result of her second injury. Rather, Ms. Sadecki lost her LEP benefits when she stipulated that "[a]s of December 31, 2003 [she] was capable of reasonably continuous gainful employment with respect to conditions proximately caused by the October 17, 2002 industrial injury and was no longer entitled to [LEP]

benefits under the claim arising out of that injury." BRT Ex. 3 at 2. As long as she was statutorily entitled to LEP benefits, nothing would have prevented Ms. Sadecki from having two open industrial insurance claims. Second, even if her LEP benefits were a "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of the injury," Ms. Sadecki fails to show her LEP benefits were critical to protecting her "basic health and survival." *Cockle*, 142 Wn.2d at 822, 823. LEP benefits are distinguishable from the core, non-fringe employment benefits of food, shelter, fuel, and health care.

To be considered "wages," "other consideration of like nature" must be "received from the employer as part of the contract of hire." RCW 51.08.178(1). Ms. Sadecki received LEP benefits for her first injury because the Department determined she was statutorily entitled to such benefits. Thus, she received LEP benefits because they were authorized by statute, not from her employer as part of her employment.

Ms. Sadecki relies on a Board decision, *In re: Lloyd J. Larson*, Nos. 860479, 860481, 860483, 862901, 863547, 1988 WL 169369, at *1-4 (Wash. Bd. Ind. Ins. App. Aug. 15, 1988), that is distinguishable. There, the Board concluded that the employee could continue to receive LEP benefits for an initial industrial injury, while also receiving time loss compensation for a subsequent industrial injury. *In re: Lloyd J. Larson*, 1988 WL 169369, at *2-3. The Board reasoned that the employee's entitlement to LEP benefits had not terminated. *Id*. at *3.

Here, in contrast, the issue is not whether Ms. Sadecki can simultaneously receive LEP benefits for her first injury and time loss compensation for her second injury, but rather, whether the time loss compensation for her second injury should be calculated using the LEP benefits received for her first injury. *In re: Lloyd J. Larson* did not address this question.[2] As noted, as long as she was statutorily entitled, Ms. Sadecki was not prohibited from receiving both LEP benefits for her first industrial injury and time loss compensation for her second industrial injury; however, she chose to enter a stipulation terminating her entitlement to LEP benefits. *See* BRT Ex. 3, at 1-2.

In addition, we note that at this point, only health care premiums meet the definition of "other consideration of like nature" under RCW 51.08.178(1). *See Corkle*, 142 Wn.2d at 823. We decline to extend the *Corkle* definition of "other consideration of like nature" to include LEP benefits from a prior, unrelated industrial injury. In sum, the Board properly concluded the LEP benefits Ms. Sadecki received for her first injury do not constitute "wages" under RCW 51.08.178(1).

Next, Ms. Sadecki contends the wage rate calculation should have been based on her earnings prior to her first industrial injury, specifically, the $4,810 average monthly wage she was earning as a registered nurse. However, for the purpose of time

[2] We note that the Board considered and rejected this argument in two later decisions. *See In re: Starr Vincent*, Nos. 97-0190, 97-0700, 97-1199, 1999 WL 123274, at *4 (Wash. Bd. Ind. Ins. App. Jan. 22, 1999); *In re: Ronnie L. Sanders*, No. 99-14713, 2000 WL 33250144, at *3 (Wash. Bd. Ind. Ins. App. Dec. 5, 2000).

loss compensation, "wages" are defined as "the monthly wages the worker was receiving from all employment *at the time of the injury*." RCW 51.08.178(1) (emphasis added). Ms. Sadecki was not receiving the $4,810 average monthly wage at the time of her second injury, on December 30, 2003. No legal basis supports calculating Ms. Sadecki's wage rate based upon her previous earnings.

Ms. Sadecki requests attorney fees and costs under RCW 51.52.130. Under RCW 51.52.130(1), attorney fees are awarded to the worker whose appeal to the superior or appellate court results in a reversal or modification of the Board decision. Because we affirm the decision of the Board, Ms. Sadecki is not entitled to attorney fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

I CONCUR:

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Schultheis, C.J.

I CONCUR IN RESULT ONLY:

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Korsmo, J.